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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5323

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THE STATE OF TEXAS

v.

DAVID HERNANDEZ APODACA

---

Appeal from the County Court at Law Number Two
El Paso County, Texas

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# JURISDICTIONAL STATEMENT

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RAYMOND C. CABALLERO

PEARSON, CABALLERO & WARACH
1610 State National Plaza
El Paso, Texas 79901
(915) 544-2114

ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

THE STATE OF TEXAS

v.

DAVID HERNANDEZ APODACA

Appeal from the County Court at Law Number Two
El Paso County, Texas

## JURISDICTIONAL STATEMENT

This is a direct appeal from the judgment of the County Court at Law Number Two for El Paso County, Texas, finding Appellant guilty of the violation of failing to identify himself by giving a report of his name and address.

### A. Reports

The court below wrote an opinion. It is not published. A copy of that opinion is attached to this Jurisdictional Statement.

### B. Jurisdiction

1. Appellant was charged in an information with violating Section 38.02 of the Texas Penal Code in that he allegedly refused to give a report of his name and residence address to a peace officer who had lawfully stopped him and requested the information. Appellant was fined $40 on the charge.

2. The judgment of the County Court at Law Number Two was entered on July 10, 1979. A Notice of Appeal was filed with that court on the same day.

3. This Court has jurisdiction by virtue of Section 1257(2) of Title 28, United States Code, which provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . [by] appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The judgment of the County Court at Law in this case is a decree rendered "by the highest court of a State in which a decision could be had," because pursuant to Article 4.03 of the Texas Code of Criminal Procedure, no appeal may be had to the Texas Court of Criminal Appeals where the fine imposed does not exceed $100. Article 4.03 provides as follows:

> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court, or the county court at law shall not exceed one hundred dollars.

4. The Texas Court of Criminal Appeals has previously held that where one is fined less than $100 in a county court at law, there is no appeal to the Texas Court of Criminal Appeals. Coates v. State of Texas, 308 S.W.2d 869 (Tex. Ct. Crim. App. 1957). See also, Williams v. Florida 399 U.S. 78 (1970).

5. In this appeal, Appellant questions the constitutionality of Section 38.02(a) of the Texas Penal Code, which provides as follows:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

C. Questions Presented

QUESTION I: Section 38.02(a) of the Texas Penal Code violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is vague on its face.

QUESTION II: Section 38.02(a) of the Texas Penal Code violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is overbroad on its face in that it makes criminal and indeed punishes conduct protected by the Constitution.

D. Statement of the Case

On June 29, 1979, El Paso Police Patrol Officers Phillip Meads and Armando Salas responded to a call reporting a gang fight in the northeast part of El Paso (T. 10-11). As they arrived in their patrol car, Appellant was seen on his bicycle leaving the area where about 12 to 20 persons had congregated (T. 13, 24). One officer was left at the scene and Officer Meads, in the patrol car, pursued Appellant (T. 25, 26). Meads later found Appellant hiding behind a wall (T. 29). Meads called out to Appellant, telling Appellant he just wanted to speak to Appellant (T. 29), and that Appellant was not under arrest (T. 32). The officer asked Appellant to return to the scene with him, but Appellant refused. Appellant was verbally abusive to the officer and also made an obscene gesture. He was placed under arrest for disorderly conduct and then apparently swung at Officer Meads and resisted arrest (T. 34, 35).



Appellant was eventually taken to the station house and was again asked to identify himself (T. 46). Appellant mentioned three names and two addresses, all nonexistent (T. 46). The officers finally were able to determine Appellant's name from fingerprint records. Appellant refused to give his name because he did not want anyone to know he was on probation (T. 52, 53, 72). Appellant made it clear that he simply did not want to speak with the officers (T. 56). No Miranda warnings were given to Appellant (T. 72).

What had originally been thought to be a gang fight was actually only a threatened fight between an adult male (Varnado) and Appellant's 15 year old cousin. Appellant's involvement, it appears, was simply that he had offered to take his cousin's place in the fight. It was at that point that the police arrived and Appellant fled (T. 77, 78).

E. Substantial Federal Question

Appellant urges this Court to note probable jurisdiction in this case because of the substantial federal questions raised here.

Section 38.02 has been reviewed once before by an appellate court, and that was by this Court in Brown v. Texas, 99 S.Ct. 2637 (June 25, 1979). In Brown, this Court held that Section 38.02 as applied on the facts of that case denied Brown his rights under the Fourth Amendment. In that unanimous opinion Chief Justice Burger stated:

> We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements . . . . The County Court judge who convicted Appellant was troubled by this question, . . . 99 S.Ct. at 2641, fn. 3.

In this case there was more than an investigatory stop. There was an arrest on two other charges, disorderly conduct

and resisting arrest, before the failure to identify charge was raised. It is not a question of the application of the statute in this case. The issue is whether the statute is unconstitutional on its face. Continued use of the statute even subsequent to Brown v. Texas calls for a decision from this Court on the constitutionality of the statute. Several other states, including California and various municipalities, have similar statutes.

In a case considered in tandem with Brown v. Texas, this Court did review the constitutionality of a similar law, a Detroit, Michigan, ordinance. Michigan v. DeFillippo, 99 S.Ct. 2627 (1979). In DeFillippo, only the initial stop was undertaken under color of the stop and identify ordinance. The defendant there was actually arrested for other violations, much like Appellant in this case. This Court held that since the arresting officer did not know the ordinance was unconstitutional, the exclusionary rule would not be applied.

In applying the DeFillippo and Brown decisions to this case, there is some confusion. In Brown, which involves this specific statute, this Court specifically left open the constitutionality of the stop and identify statute. In DeFillippo, this Court apparently agreed for purposes of the case that the Detroit ordinance was unconstitutional. Indeed, the dissent by three justices stated as follows:

> The Court does not dispute this analysis [that the ordinance cannot punish conduct protected by the Constitution]. Rather, it assumes that respondent had a right to refuse to cooperate with the police inquiries, that the ordinance is unconstitutional, and that henceforward the ordinance shall be regarded as null and void.

The problem is that while in one decision this Court apparently agreed with the Supreme Court of Michigan that the



stop and identify ordinance was void for vagueness and was therefore null and void, it expressly left open the question of the constitutionality of the Texas stop and identify law which is drafted in language which is less precise than the Detroit ordinance. Texas has, therefore, taken the position that Section 38.02 is constitutional and is enforceable.

Over a period of time, this Court has held applicable to the states the First, Fourth, Fifth, and Sixth Amendment to the United States Constitution through the Due Process Clause of the Fourteenth Amendment. Thornhill v. Alabama, 310 U.S. 88 (1940); Mapp v. Ohio, 367 U.S. 643 (1961); Malloy v. Hogan, 378 U.S. 1 (1964); and Gideon v. Wainwright, 372 U.S. 335 (1963).

In addition to those rights, this Court has also held that certain fundamental and procedural due process rights were applicable to the states through the Fourteenth Amendment Due Process Clause. Among those is the requirement that penal statutes be drafted in such a manner that the conduct which they purport to prohibit is clearly ascertainable from a reading of the statute. Connally v. General Const. Co., 269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); and Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

The words of the statute, particularly "lawfully stopped," are so imprecise that one might feel that the words might not be applicable in his case. As an example see Norwell v. Cincinnati, 414 U.S. 14 (1973), where a man was stopped and questioned and "nonprovocatively" voiced his objection to the stop and was arrested for disorderly conduct.

To be constitutional a statute must have ascertainable standards of guilt so as to give a reasonable notice of the conduct which it purports to prohibit. Palmer v. Euclid, 402 U.S. 544, 545 (1971). Inasmuch as this Court has made

it quite clear that one has the right to remain silent, Miranda v. Arizona, 384 U.S. 436 (1966), and the right to object, verbally and nonprovocatively, to a stop, the public might in fact believe that one may remain silent when confronted by a police officer. Indeed, those principles were reaffirmed in DeFillippo.

In addition to facial vagueness, Section 38.02 is also unconstitutional because it is overbroad on its face. A statute may be attacked for facial vagueness and overbreadth even if it appears valid as applied to the conduct of the accused raising the issue. Plummer v. Columbus, 414 U.S. 2 (1973).

Clarity must exist not only as discussed in the vagueness problem above, but also in the scope of application of the statute. Where a statute possibly makes criminal protected conduct, it is overbroad. Gooding v. Wilson, 405 U.S. 518 (1972); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Plummer v. Columbus, supra; and Hess v. Indiana, 414 U.S. 105 (1973). In cases involving First Amendment rights, this Court has traditionally looked much closer at any statute potentially infringing on such protected activities. Those laws possibly punishing First Amendment protected speech or expression must be "narrowly drawn to prevent the supposed evil." Cantwell v. Connecticut, 310 U.S. 296 (1940); Ashton v. Kentucky, 384 U.S. 195 (1966); and Keyishian v. Bd. of Regents of U. of St. of N.Y., 385 U.S. 589 (1967).

With respect to Section 38.02(a), it is possible that a similar statute could have been drafted so as to cure its overbreadth. The caption of the section states: "Failure to Identify as Witness," but the body of the provision does not



mention the word "witness." The section on its face applies to everyone, witnesses and nonwitnesses alike. There is, however, an indication that the overbreadth was not intended by the legislature.

Section 38.02(a) replaced Article 2.24 of the Texas Code of Criminal Procedure, which was repealed in 1973 upon the enactment of Section 38.02(a). Article 2.24 provided as follows:

Identification of Witnesses

> Whenever a peace officer has reasonable grounds to believe that a crime has been committed, he may stop any person whom he reasonably believes was present and may demand of him his name and address. If such person fails or refuses to identify himself to the satisfaction of the officer, he may take the person forthwith before a magistrate. If the person fails to identify himself to the satisfaction of a magistrate, the latter may require him to furnish bond or may commit him to jail until he so identifies himself.

This old Article 2.24 which was repealed has several useful points not found in new Section 38.02(a). First, it specifically states that the officer must have reason to believe that a crime was committed. Second, it was not a penal statute and did not give the officer the unfettered right to place a subject under arrest for the mere refusal to speak. Third, a neutral and detached magistrate made the final decision, and presumably if the officer could not show that the subject was a witness to a crime, not even the magistrate could compel the subject to state his name.

New Section 38.02(a) has none of the foregoing protections and can apply to anyone whether a crime was committed or not. This Court has long recognized the right of a state to question material witnesses to a crime, and indeed to detain them if necessary. Stein v. New York, 346 U.S. 156, 184 (1953). See also, Rule 46(g), Federal Rules of Criminal Procedure, and

Section 3149, Title 18, United States Code. In expanding the statute here beyond the reach of material witnesses, the legislature made the statute too broad and, therefore, unconstitutional because the new statute then made criminal conduct protected by the First, Fourth, and Fifth Amendments as applied to the states through the Fourteenth Amendment Due Process Clause.

The right to remain silent, completely silent, in the face of police questioning is a right protected by several of the amendments to the Constitution. Among them would be the Fourth, Fifth, and the general "right to be let alone . . . ." Michigan v. DeFillippo, supra, at p. 2636 (dissent).

If one has the right to protest an arrest, Norwell v. Cincinnati, supra, or to use profane or displeasing speech, Terminiello v. Chicago, 337 U.S. 1 (1949); Eaton v. City of Tulsa, 415 U.S. 697 (1974); and Hess v. Indiana, 414 U.S. 105 (1973), can the right to remain silent be any less secure?

Compelling speech when the Constitution protects silence is a violation of both the Fourth and Fifth Amendments, much like the forced production of private records. Boyd v. United States, 116 U.S. 616 (1886). And punishing one for the invocation of a constitutional right, such as the right to remain silent, is also prohibited by the Constitution. See v. Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Albertson v. SACB, 382 U.S. 70 (1965); Marchetti v. United States, 390 U.S. 39 (1968); Haynes v. United States, 390 U.S. 85 (1968); and Leary v. United States, 395 U.S. 6 (1969).

There are cases in which this Court has held constitutional compelled speech or reports. California v. Byers,



402 U.S. 424 (1971); Shapiro v. United States, 335 U.S. 1 (1948); and United States v. Sullivan, 274 U.S. 259 (1927). In those cases, however, there were overpowering state or federal interests to which constitutionally protected activities or rights were subordinated.

An examination of the interests conceivably sought by the state in this case are not so strong that one might set aside constitutionally protected rights. Furthermore, where a more carefully drawn statute could protect both interests, the statute must also fall. If the Detroit ordinance is void for vagueness, can the more imprecise Texas statute be constitutional?

In this case the state might argue that having the name of an accused makes for good police work or for more efficiency in the criminal justice system. Perhaps it is so. But having one's name certainly subsequent to arrest is not truly necessary. Courts may compel various forms of identification from a defendant. United States v. Wade, 388 U.S. 218 (1967); United States v. Dionisio, 410 U.S. 1 (1973); Gilbert v. California, 388 U.S. 263 (1967); United States v. Mara, 410 U.S. 19 (1973); and Cupp v. Murphy, 412 U.S. 291 (1973).

Where one refuses to provide his identity, the refusal may be a factor in considering bail, but it should not furnish the basis for further criminal prosecution. The stop and identify statute simply gives the police or prosecutor too much of an opportunity to stop persons on a pretext or to punish those who object to arrests or remain silent. It now makes criminal that which law students understand, the John Doe charge, plus a forced plea of not guilty for that accused

who chooses to stand mute even in the courtroom.[1] The stop and identify law "commands that which the Constitution denies the state power to command and makes a crime out of what, under the Constitution, cannot be a crime. Coates v. City of Cincinnati, 402 U.S. 611 ... (1971)." Michigan v. DeFillippo, supra at p. 2636.

The stop and identify law simply has us go full circle to bite our own tail--that is, to mandate that officers advise defendants of their right to remain silent after arrest, then to have the accused charged with a crime for the invocation of the right to remain silent. The accused simply has the right to remain silent, mute. Assuming probable cause to arrest the accused on other grounds, there are ample other ways available to determine identity.

In the concurring and dissenting opinions in Michigan v. DeFillippo, this Court recognized the fact that stop and identify laws do at least hold out the potential for abuse. Pretextual arrests like the one in Brown can be and are often made. So the laws have a high potential for abuse, while holding out little in the way of a benefit. In the case of a Terry type stop, it has been recognized that one has the right to refuse to speak and simply walk away. In the case of a full detention, even one based on probable cause, one has the right to remain silent. In either event there is no constitutional justification for the stop and identify laws.

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[1] Section 344, Wharton's Criminal Procedure. "The effect of the refusal of a defendant to plead when arraigned is too well known to require discussion. A not guilty plea is entered for him and the case proceeds." Ruckle v. Warden, Maryland Penitentiary, 335 F.2d 336 (4th Cir. 1964), cert. denied, 379 U.S. 934.



Although stop and identify laws have a high incidence of abuse, they are rarely reviewed by appellate courts. The fact that the law is used in Texas but has never been reviewed by a Texas appellate court is simply a manifestation of its pretextual use. Brown v. Texas was simply a rare exception where, for some reason, the prosecution was pursued even though no other violation was turned up. This case is just one where the officers decided to "stack" several charges on the accused. The opportunity to review the law should not be lost.

## Prayer

For all the foregoing reasons, Appellant urges this Court to note probable jurisdiction and to set this case down for full hearing, briefs, and arguments on the merits.

Respectfully submitted,

PEARSON, CABALLERO & WARACH
Attorneys for Appellant
1610 State National Plaza
El Paso, Texas 79901

By: Raymond C. Caballero
RAYMOND C. CABALLERO

## Certificate of Service

I do hereby certify that on this 4th day of September, 1979, a true and correct copy of the foregoing Jurisdictional Statement was mailed to The Honorable Mark White, Attorney General of the State of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711.

Raymond C. Caballero
RAYMOND C. CABALLERO

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* * *

NO. 79-5323

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DAVID HERNANDEZ APODACA,
Appellant

V.

THE STATE OF TEXAS,
Appellee

* * *

On Appeal From The County Court At Law No. 2,
El Paso County, Texas

* * *

# MOTION TO DISMISS OR AFFIRM

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

RENEA HICKS
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR APPELLEE

IN THE

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NO. 79-5323

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DAVID HERNANDEZ APODACA,
Appellant

V.

THE STATE OF TEXAS,
Appellee

* * *

On Appeal From The County Court At Law No. 2,
El Paso County, Texas

* * *

MOTION TO DISMISS OR AFFIRM

* * *

Appellee, the State of Texas, moves the Court to affirm the judgment of the County Court at Law No. 2 of El Paso, County, Texas, on the ground that it is in full accord with the dictates of the United States Constitution or to dismiss the appeal because the issues it presents do not raise a substantial federal question.

OPINION BELOW

The unpublished opinion of the court below is attached to Appellant Apodaca's Jurisdictional Statement.

JURISDICTION

Jurisdiction in this Court is proper under 28 U.S.C. §1257(2), since a final judgment has been rendered by the highest Texas court in which a decision could be had and the court below upheld the validity of a state statute against a federal constitutional attack.

STATUTE INVOLVED

Section 38.02(a), Texas Penal Code, reads as follows:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

QUESTIONS PRESENTED

I. Whether Section 38.02(a), Texas Penal Code, is on its face unconstitutionally vague?

II. Whether Section 38.02(a), Texas Penal Code, is unconstitutionally overbroad because it infringes upon rights protected by the First, Fourth, and Fifth Amendments to the United States Constitution as made applicable to the states through the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of conviction entered against Appellant Apodaca on July 10, 1979, in Case No. 79-10661 in County Court at Law No. 2, El Paso County, Texas, after trial before the Court.

On June 29, 1979, two uniformed officers of the El Paso Police Department were dispatched in a marked patrol car to a residential neighborhood where a gang fight was reported in progress. Upon arrival at the scene, the officers observed a crowd of approximately 18 to 24 people of varying ages, but predominantly young, milling about. Several were carrying sticks and pipes. The officers saw no blows being struck, but several people in the crowd were yelling and pointing to a young man vigorously riding away from the scene on a bicycle and proclaiming that he had threatened them with a pipe.

While one of the officers remained with the crowd, the other gave pursuit in the patrol car. At first, the pursuing officer could not find the fleeing young man, but after a few minutes he found him hiding behind a rock wall encircling a back yard in the neighborhood. The officer -- Officer Meads -- summoned the man -- who later proved to be Mr. Apodaca -- and told him that, although he was not under arrest, he must return to the scene of the reported gang fight so that matters there

could be straightened out. Mr. Apodaca, who spoke both English and Spanish during this exchange, exhibited some reluctance about going back and thereupon shot the officer "the finger," also known as digitus impudicus. In the meantime, a group of young girls had approached the pair, and discussions were transpiring in Spanish between Apodaca and some of the girls.

At this point, Apodaca became even more reluctant and began to refuse cooperation in loud, vulgar language. Officer Meads then indicated he would arrest him for disorderly conduct and began to frisk him, whereupon Apodaca swung his elbow forcefully around, striking the officer. While Apodaca continued with some resistance, the officer handcuffed him, placed him in the back seat of the patrol car, and drove back to the scene of the reported gang fight.

Once back there Officer Meads asked Apodaca his name and received a vulgarity in response. After being unable to determine Apodaca's name by questioning some people in the crowd, Officer Meads again asked Apodaca his name and, this time, his address. The retort was the same previously uttered vulgarity and a kick of the patrol car seat. Officer Salas -- Officer Meads' partner -- then asked Apodaca his name, and Apodaca's response was that he did not know or remember. After Apodaca was taken to the police station, the two officers as well as several other officers questioned Apodaca in both Spanish and English, asking him numerous times for his name. He never gave it, but it finally was retrieved by feeding Apodaca's fingerprint information into a computer which presumably contained the information because Apodaca at the time was on probation for burglary of a habitation. At about this point -- two hours after stopping



Apodaca -- the officers decided to charge him with a violation of Section 38.02(a) in addition to the two already leveled charges of disorderly conduct and resisting arrest. From the time he was stopped through the time he was charged with failure to identify, Apodaca was not given his Miranda warnings by either Officer Meads or Officer Salas.

After Apodaca was tried and convicted in the municipal court for disorderly conduct and failure to identify, he sought and obtained a trial de novo in the county court at law. There, the criminal charges against Apodaca -- Disorderly Conduct (§42.01, T.P.C.), Resisting Arrest (§38.03, T.P.C.), and Failure to Identify (§38.02(a), T.P.C.) -- were consolidated and tried before the court without a jury. Apodaca was found guilty of all three offenses and sentenced as follows: $45.00 fine plus costs for disorderly conduct; $40.00 fine plus costs for failure to identify; and seven (7) months incarceration, with imposition of sentence suspended and placement on probation for one year, for resisting arrest. The record reflects only an appeal of the conviction for failure to identify, and, since the fine for that offense did not exceed $100.00, the county court at law was the highest court of the state in which a decision could be had, Art. 4.03, Texas Code of Criminal Procedure. Accordingly, an appeal was taken directly to this Court.

## ARGUMENT

### I.

### The Judgment Below Is In Full Accord With The United States Constitution On All The Grounds Presented To This Court.

A. Vagueness. -- Section 38.02(a) on its face is not unconstitutionally vague and therefore does not violate the Due Process Clause of the Fourteenth Amendment.

A penal statute is unconstitutionally vague and, therefore, void under either the Fifth or Fourteenth Amendment's

Due Process Clause if it "'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,'" Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), quoting from United States v. Harriss, 347 U.S. 612, 617 (1954), or if it encourages arbitrary and discriminatory enforcement. Papachristou v. City of Jacksonville, supra at 162. Section 38.02(a) is not unconstitutionally vague under either of these tests. The elements necessary for a violation of Section 38.02(a) are clear and as precise as can reasonably be expected of statutory language. There must be a lawful stop, a request for the stopped person's name and address, and a refusal by the the stopped person to give his name and address, which refusal must be intentional.

Apodaca argues that the statute's requirement that the stop be a lawful one imparts the unconstitutional vagueness into the law. Brown v. Texas, ___ U.S. ___, 99 S.Ct. 2637 (1979), made clear what the State of Texas had contended on that appeal and continues to contend -- that the phrase "lawful stop" in Section 38.02(a) embodies the concept originating with Terry v. Ohio, 392 U.S. 1 (1968), and continuing through more recent cases such as Delaware v. Prouse, 440 U.S. ____, 99 S.Ct. 1391 (1979). Admittedly, Section 38.02(a) includes in its definition of the crime a constitutional norm, but the Court has twice before rejected vagueness attacks on a statute which refers to constitutional norms in defining a crime. Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945) (the phrase "rights, privileges, or immunities secured or protected by the constitution" held not to be unconstitutionally vague). That a "willfulness" requirement was read into the statute in Screws, supra, and that "[t]his Court has long



recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea," see Colautti v. Franklin, 439 U.S. 379, 395 (1979), does not signify the invalidity of Section 38.02(a), since it does contain a scienter requirement both within the statute's text and through external directive. See Section 6.02, Texas Penal Code.

Likewise, Section 38.02(a) is not unconstitutionally vague because it does not encourage arbitrary and discriminatory enforcement. It has engrafted upon it the "lawful stop" concept embodied in Terry, supra, which itself was an attempt to discourage the arbitrary and discriminatory enforcement of criminal laws. The use of the identical concept in Section 38.02(a), which has a similar objective, see Section 1.02(5), Texas Penal Code, cannot be said to impart unconstitutional vagueness into the statute, unless this Court intends to concede that its efforts in Terry and its progeny to place some constitutional controls upon street encounters between citizens and law enforcement officials have been futile.

B. Overbreadth. -- The court below's rejection of any overbreadth attack upon Section 38.02(a) should be affirmed. Although Appellant has attempted to invoke the overbreadth doctrine in the context of First, Fourth, and Fifth Amendment rights, overbreadth analysis, or more appropriately, substantial overbreadth analysis, is to be employed only in the context of First Amendment rights. Broadrick v. Oklahoma, 413 U.S 601, 611-18 (1973). Clearly, no First Amendment speech issues are present in this case, since Apodaca has not demonstrated that his silence in the face of the officers' questions is an expression of any moral, religious, artistic, or political idea. Cf. Wooley v. Maynard, 430 U.S. 705 (1977).

His attempt to invoke the First Amendment to the officers' questions about his name and address is an unacceptable approach to constitutional analysis bordering on the absurd. With no First Amendment rights at stake, the Court need not engage in the overbreadth analysis sought by Apodaca.

II.

The Posture Of The Case Before This Court Is Such That No Arguably Meritorious Attack On The Statute Is Squarely Presented And, Therefore, The Appeal Should Be Dismissed For Lack Of A Substantial Federal Question.

Apodaca's Fourth and Fifth Amendment attacks upon Section 38.02(a) are subsumed within his overbreadth claim against the statute. Indeed, the "Questions Presented" portion of Appellant's Jurisdictional Statement is devoid of any reference to either the Fourth or Fifth Amendment. The only questions presented there concern vagueness and overbreadth. See Jurisdictional Statement at p.3. Furthermore, the portion of the Jurisdictional Statement in which Apodaca argues for the substantiality of the federal questions presented by his challenge to the statute tends to treat the Fourth and Fifth Amendments together with other constitutional claims in such a way as to make it unclear how he is arguing that a particular result allegedly flowing from the statute's existence implicates a particular constitutional amendment, whether it be the Fourth or Fifth.

Insofar as Apodaca suggests that the Fifth Amendment as explicated by Miranda v. Arizona, 384 U.S. 436 (1966), prohibits the imposition of criminal sanctions under Section 38.02(a) for failure to give one's name in response to an officer's questioning, his argument must fail. Miranda disavowed its applicability to the kind of encounter addressed in Section 38.02(a). "General on-the-scene questioning



as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." 384 U.S. 477. See also, Oregon v. Mathiason, 429 U.S 492, 495 (1977). Miranda left law enforcement officers free to ask arrested persons questions for the purpose of obtaining identifying information, such as names. United States v. Prewitt, 553 F.2d 1082 (7th Cir.), cert. denied, 434 U.S. 840 (1977); United States ex rel. Hines v. La Valle, 521 F.2d 1109 (2d Cir. 1975), cert. denied, 423 U.S. 1090(1976); United States v. Grant, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977); Morrison v. United States, 491 F.2d 344 (8th Cir. 1973); Farley v. United States, 381 F.2d 357 (5th Cir.), cert. denied, 389 U.S. 942 (1967). Cf. Adams v. Williams, 407 U.S. 143, 146 (1972).

Insofar as Apodaca argues that Section 38.02(a) violates the Fourth Amendment because it permits police officers to make pretextual arrests in the hopes of finding incriminating evidence of more substantial crimes in the ensuing search incident to arrest or with the aim of forcing the arrested person to choose which of his constitutional rights to assert, see, e.g., Michigan v. DeFillippo, ___ U.S. ___, ___, 99 S.Ct. 2627, 2636-37 (1979)(Brennan, J., dissenting), it can only be remarked that that situation, which might raise a substantial federal question if squarely presented, is not presented here. There is no evidence that the statute is being used generally in a pretextual manner. See Michigan v. DeFillippo, ___ U.S. at ____, 99 S.Ct. at 2634 (Blackmun, J., concurring). In this case, Apodaca had already been arrested for one crime and charged with an additional crime before the officers decided to charge him with a violation of Section 38.02(a). Thus, charging him with failure to identify could not conceivably have been

undertaken as a pretext for further incursions upon his privacy, including a full-scale search incident to arrest. The unchallenged, already leveled charges substantially stripped Apodaca of the full protections normally afforded by the Fourth Amendment. Instead, the charge merely imposed sanctions upon him for his failure to fulfill the minimal statutory duty placed upon him by Section 38.02(a) of helping law enforcement officers obtain basic identifying, non-incriminating information about circumstances surrounding a possibly criminal event. There was no incursion upon any of Mr. Apodaca's privacy rights protected by the Fourth Amendment, since he not only had been lawfully stopped but had been lawfully arrested on two other criminal charges prior to his being charged under Section 38.02(a).

## CONCLUSION

Appellee respectfully submits that the judgment of conviction entered for failure to identify by the court below should be affirmed. The posture of the constitutional arguments presented to this Court concerning why Section 38.02(a) should be declared invalid on its face is such that no substantial claim of constitutional impropriety in Appellant's conviction has been stated.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

RENEA HICKS
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR APPELLEE